Supreme Court of the United States

OCTOBER TERM, 1939

NO.....

HARRIET K. MOON, *Petitioner*,

VS.

HOME LIFE INSURANCE COMPANY OF NEW YORK, a corporation, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit rendered in this case is reported in 110 Fed. (2d) page 184, and also appears at pages 248-256 of the Transcript of Record.

II.

JURISDICTION

1. The date of the judgment sought to be reviewed herein is March 12, 1940, (Tr p. 256); the date of order denying a rehearing was entered on April 11, 1940. (Tr. p. 263).

2. The jurisdiction of this Court is invoked under the provisions of Sec. 240 (a) of the Judicial Code, as amended. (U.S.C.A., Title 28, Sec. 347 (a).

III.

STATEMENT OF THE CASE

A full statement of the case will be found under the heading "Summary Statement of the Matters Involved" in the Petition filed herein, to which this brief is appended, and in the interest of brevity will not be repeated.

IV.

SPECIFICATION OF ERROR

The errors of the Circuit Court of Appeals urged by the petitioner are set forth in the petition herein under the heading "Reasons Relied on for the Allowance of the Writ" and for the sake of brevity will not be repeated here.

V.

SUMMARY OF ARGUMENT

I. The Court erred in failing to apply the rules and laws of the State of West Virginia to the case at bar.

II. The Court erred in drawing its own inferences from the testimony contrary to the verdict of the jury.

III. The Court erred in substituting its own opinion of the evidence for the verdict of the jury.

IV. The Court, in effect, denied trial by jury.

VI.

ARGUMENT

POINT I.

The Court erred in failing to apply the rules and laws of the State of West Virginia to the case at bar.

The insurance policy contracts in suit were applied for by the insured, countersigned by the resident agent, and delivered to the insured, Charles C. Moon, while he was a resident of West Virginia (Tr. pp. 19 to 40 both inclusive), and it is conceded that the insurance policies sued on were West Virginia contracts. (Tr. p. 250). These suits were instituted in the Circuit Court of Cabell County, West Virginia, a state court, and were removed to the Federal Court by reason of diversity as to citizenship. (Tr. p. 246). It is our contention, therefore, that the laws of West Virginia should govern the construction, rights, privileges, the burden of proof, and the right of trial by a jury accruing under the West Virginia law. (Erie R. Co. vs. Tompkins, 304 US 64, 82 L. ed. 1188; Sec. 725, Title 28, U. S. C. A.; and City Service Oil Co. v. Dunlap, — US — 84 L. ed. 185.)

(a) The rule of reasonable doubt in cases such as this applies in West Virginia.

This question was first considered by the West Virginia Supreme Court of Appeals, the court of last resort of that State, in *Beard v. Indemnity Insurance Company*, 65 W. Va. 283, 64 S. E. 119, which was a case involving the construction of an accident insurance policy, and the court, in deciding the question, stated the law to be (2nd point of the syllabus):

"In such case, unless the injury is shown to have been intentionally self-inflicted, or intentionally inflicted by some other person, legal presumption is that it was accidental."

In *Goodbar v. Western & Southern Life Insurance Company*, 89 W. Va. 221, 108 S. E. 896, the question again arose in an insurance case involving the effect of an exception in the policy of insurance in the event insured died from suicide, and the said court held (2nd point of the syllabus):

"Where, in a suit on a policy of life insurance, the defendant relies upon a provision of the policy defeating recovery if the insured dies from suicide, while sane or insane, within two years from the date of the policy, the evidence to show that the insured's death was suicidal must be clear and satisfactory, and where circumstantial evidence is relied upon for such purpose, such circumstances must establish that death resulted from suicide to the exclusion of every reasonable hypothesis consistent with death from natural causes."

And the Court further held, in such case, that suicide will not be presumed.

In *Martin vs. Mutual Life Insurance Company*, 106 W. Va. 533, 146 S. E. 53, a case involving a contract of insurance with double indemnity in case of accidental death the said Supreme Court held (Point 1 of the syllabus):

"Where a plaintiff, suing to recover upon a policy insuring against death from bodily injury effected solely through external violence and accidental means, made a prima facie case thereof, the burden then rests upon the defendant to establish the affirmative defense that the insured came to his death as a result of a violation of law, a cause of liability excepted in the policy."

and this case considered and reaffirmed the former holdings.

Subsequently, the Supreme Court of Appeals of the State of West Virginia reconsidered the question in *McDaniel vs. Metropolitan Life Ins. Co.* (W. Va.), 195 S. E. 597, and the Court, without overruling or disturbing the earlier decisions, reiterated the rule in this language:

> "The defendant, in relying upon suicide as a defense to this action, assumes the burden of proof on that point * * *, and where circumstantial evidence is relied upon for such purpose such circumstances must establish that death resulted from suicide to the exclusion of every reasonable hypothesis consistent with death from natural causes."

And in *Beckley National Exchange Bank v. Provident Life and Accident Insurance Co.* (W. Va.), 2 S. E. (2d) 256, the court again approved the rule, but did not apply the same in that case due to the fact that the death of the insured was explained, for the wife shot her husband.

And so, therefore, the Supreme Court of Appeals of West Virginia has established the rule in such cases that where death is shown to have been caused by violent and external means a prima facie case has been made; and where it is contended that the injuries were self-inflicted, the burden of proof is upon the defendant, and unless the evidence establishes suicide to the exclusion of every reasonable hypothesis consistent with death from natural causes, the plaintiff is entitled to a decision upon the evidence.

This rule was recognized by the Circuit Court of Appeals for the Fourth Circuit in *Tabor v. Mutual Life Insurance Company of New York* (C. C. A. 4), 13 F. (2d) 765, which was a case arising within the State of West

Virginia, and appealed to that Court; also a presumption of death from 7 years absence was held binding on said court in *Metropolitan Life Ins. Co. v. Goodwin* (C. C. A. 4), 92 F. (2d) 274.

This rule of law was contended for by plaintiff in the District Court by the request for instructions to the jury to be embodied in the charge of the Judge, which requests were refused. (Tr. pp. 235 to 243.) It was again contended for in the Circuit Court of Appeals (Appellee's brief and in Petition for Rehearing) (Tr. p. 257).

Giving effect to this rule, we respectfully submit that by evidence adduced herein the plaintiff fully established her case and that there is no basis in the evidence for a judgment in favor of the defendant.

(b) Under the West Virginia Constitution the plaintiff is entitled to a jury trial.

The constitution of the State of West Virginia has embodied in it the bill of rights, with certain modifications necessary from a local standpoint, and which is known as *Article 3*. Section 13 of Article 3 of that Constitution is as follows:

> "In suits at common law where the value in controversy exceeds $20.00 exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit before a Justice a jury may consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to the rules of the common law."

After removal of this cause to the District Court, plaintiff demanded and was accorded a trial by jury. (Tr. p. 11.)

The West Virginia Supreme Court of Appeals under this constitution has said, in *Gibson v. City of Huntington*,

38 W. Va. 177, 18 S. E. 447, that when the jury, by its determination, finds certain facts, the Court cannot disturb that opinion even though it entertain a different opinion. To do so would be a denial of the right of trial by jury guaranteed by the Constitution of the State.

And so, we submit, that upon the facts in this case the plaintiff was entitled to have her case submitted, under West Virginia law, to a jury for its determination.

(c) The jury is exclusively the judge of the weight of the testimony and inferences from it.

The contention was raised in Beard v. Indemnity Insurance Company, supra, that inasmuch as all the facts were circumstantial and the defense was based on the ground that the insured had destroyed himself, that the matter was one for the Court, but the West Virginia court held:

> "Upon the evidence adduced in the case, the issues were properly to be disposed of by the jury."

In the case of *Young v. Home Life Insurance Company*, 115 W. Va. 716, 173 S. E. 566, a case in which the plaintiff was seeking a recovery for disability and the defense was upon the theory that the plaintiff was a malingerer, the court held (Point 3 of the syllabus):

> "The jury are exclusively and almost uncontrollably the judges of the weight of the testimony or *inferences from it.*" (Italics ours.)

This case further held:

> "* * * usually, when a prima facie case has been made out by the plaintiff as here, the question as to whether it has been rebutted is for the jury."

In McDaniel vs. Metropolitan Life Insurance Company, supra, the Court, in disposing of the contention that it was a matter for the Court instead of for the jury, quoted with approval from a case therein cited and approved the conclusions that,

> "and if *all* fair-minded men would agree that under the evidence offered death of the insured was the result of suicide rather than accident, the court should decide the question as one of law."

And so, under the decisions of the Supreme Court of Appeals for the State of West Virginia, if one should be in doubt from the evidence in this case as to whether or not the death of the insured was the result of suicide rather than accident, the question must be submitted to a jury, and the decision of the jury thereon is final and conclusive.

Needless to say the record of the case disputes any theory that all reasonable minds agree as to whether death was accidental or intentionally self-inflicted.

We would call attention to the opinion of the Circuit Court of Appeals of the Fourth Judicial Circuit in this case wherein it draws its own opinions, its own beliefs (so denominated) contrary to the verdict of the jury rendered in this case, and, ignoring the verdict of the jury, writes up its decision and judgment upon its own findings. We submit that this denies to the petitioner the right of trial by jury to which she is entitled under the law.

Under the West Virginia law, we submit that the evidence in this case together with the "presumption against suicide" must be submitted to the jury, for its determination and the Circuit Court of Appeals had not the right to set aside the verdict of the jury so returned which established the fact that the death of Moon was accidental.

All of which was contended for in the Circuit Court of Appeals in Appellee's Brief and in Petition for Rehearing. (Tr. pp. 257-263.)

POINT II.

The Circuit Court of Appeals erred in drawing its own inferences from the testimony contrary to the verdict of the jury.

We have heretofore set out the rule in West Virginia with reference to an appellate court drawing inferences from the testimony contrary to the verdict of the jury. In the petition of this petitioner for a rehearing, filed in the Circuit Court of Appeals, a number of inferences from the evidence contrary to the conclusions and inferences drawn from the evidence by the jury were pointed out, to which we particularly call the attention of this Court. (Tr. pp. 258 to 261.)

The rule is established by many decisions of the West Virginia court that upon appeal the evidence is to be considered in the light most favorable to sustain the verdict (See Davis v. Alford, 113 W. Va. 30, 166 S. E. 701; Wiseman vs. Ryan, 116 W. Va. 525, 182 S. E. 670; Coleman v. N. & W. Railway Co., 100 W. Va. 679, 131 S. E. 563), and this rule is in conformity with a like rule established by the decisions of the said Circuit Court of Appeals for the Fourth Circuit. (See Hartford Fire Insurance Co. v. Kiser (C. C. A. 4th, 64 F. (2d) 288.)

The Circuit Court of Appeals, in its opinion, recognizes that it is drawing inferences from the evidence by the use of this language:

> "There is very little dispute as to the evidence in this case, though there is wide divergence of opinion as to the proper inferences, both great and small, to be drawn from this evidence."

(Tr. pp. 249-250.) And again speaking of the second note, the one which bears date on the Saturday preceding deceased's death, the Circuit Court in its opinion said:

> "Literally and figuratively, this second note (we believe), was written when insured was in *dead* earnest." (Tr. p. 254.)

These illustrations, we submit, but sustain the conclusion expressed and apparent upon the face of the opinion that the Court gave no consideration to the evidence in a light most favorable to the verdict, but drew its own inferences from the evidence and made its own finding thereon.

POINT III.

The Circuit Court of Appeals erred in substituting its own opinion of the evidence for the verdict of the jury.

From the foregoing, it is conclusive, we submit, that the Circuit Court of Appeals has substituted its own opinion, derived from the inferences and beliefs drawn by it from a reading of the evidence, without the opportunity of seeing and hearing the witnesses, and by entering judgment thereon, refusing to accord any weight whatsoever to the verdict of the jury rendered in this case and the actions of the trial judge in entering judgment on that verdict.

We submit that the weight and balance of evidence was for the jury, and their conclusions upon it in respect to its preponderance when fairly reached is not reexaminable. (See Ives v. Grand Trunk R. Co., 144 U. S. 408, 36 L. ed. 485 and Best vs. District of Columbia, 291 U. S. 411, 78 L. ed. 882.) This question was also raised in the Circuit Court of Appeals upon the petition for a rehearing. (Tr. pp. 262-263.)

POINT IV.

The Court, in effect, denied a trial by jury.

Assuming for the sake of argument only, that the West Virginia law does not govern in this case, but that the case is triable under so called "Federal Law", we submit that under the seventh amendment to the Constitution of the United States a trial by jury was and is preserved to this petitioner.

In Capital Traction Co. v. Hof (174 U. S. 1), this Court held that where a trial by jury has been had in an action at law in a court either of the United States or of a state the facts there tried and decided can not be re-examined in any court of the United States otherwise that according to the rules of the common law of England.

In Goldman vs. United States, 245 U. S. 474, this Court held that a reviewing Court can not invade the province of the jury by determining questions of credibility and weight of evidence, and then drawing conclusions from the residuum of evidence that there is no evidence.

In Connecticut Mutual Life Insurance Company v. Latrop, Admr., 111 U. S. 612, 28 L. ed. 536, this court held that where a cause fairly depends upon the effect or weight of the testimony, it is one for the consideration and determination of the jury.

Again in Home Benefit Association v. Sargent, 142 U. S. 691, 35 L. ed. 1160, in an action to recover on a life insurance policy and in which the defense was based upon alleged suicide, this court held that on the evidence given in the bill of exceptions, the jury were fully warranted in finding the assured died by accident.

And in Best, Admr. v. District of Columbia, 291 U. S. 411, 415, 78 L. ed. 882, 885, this Court, speaking by the Chief Justice, said:

> "Where uncertainty arises either from a conflict of testimony or because, the facts being undisputed, fair-minded men may honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

And lastly, in New York Life Insurance Co. v. Gamer, 303 U. S. 161, 82 L. ed. 726 (although now impliedly overruled as to the application of local law by Erie R. Co. vs. Tompkins, 304 U. S. 64), this court recognized the right of the jury to pass upon the evidence, and speaking through Associate Justice Butler, said:

> "In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the jury is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends, and, in reaching its decision, should take into account the probabilities found from the evidence to attend the claims of the respective parties."

Attention is invited to the fact that in the trial Court and in the Circuit Court of Appeals the rule announced in the decision of the Circuit Court of Appeals for the Fourth Circuit, in Jefferson Standard Life Insurance Company vs. Clemmer, 79 F. (2d) 724-729 was followed and applied. The charge of the Court to the jury was the rule announced in said case (Tr. p. 231 to 235), and the jury was accordingly instructed contrary to the rule announced by the Supreme Court of Appeals of West Virginia as to presumption against suicide, as to the weight of the testimony and as to burden of proof. Under such very harsh rule, considered in the light of the West Virginia rule, and under such very definite instructions the jury returned a verdict in favor of the plaintiff. No error of any kind or character has been charged or asserted by the defendant insurance companies against any alleged error in the trial

court, and no exceptions by said defendants were taken to the charge of the jury as aforesaid, its only complaint being that the evidence was insufficient. This jury heard all of the evidence, saw and observed the witnesses, observed their demeanor and their conduct, and gave to all such weight as to them seemed right and proper, and, under the instructions of the Court, rendered their verdict. It is this verdict, so rendered, so recorded, and against which no error in its rendition is charged by the defendants, which is thus set at naught and supplanted by the inferences, beliefs, and opinions of a court who did not hear witnesses testify; had no occasion to observe their demeanor or their conduct.

Moon, the insured, died in a small fish pond or pool scarcely sixteen inches longer than his own body (Tr. p. 56) and which contained water not over sixteen inches deep (Tr. p. 151). Counsel for the Insurance Companies contend that Moon stood on the edge and jumped backward into this pond or pool and the Circuit Court of Appeals, by their opinion, conclude "that he did not fall into the pool accidentally". This version is not substantiated by the evidence. The evidence shows that Moon had his hat on his head when he fell, for his hat was found floating in the pool (Tr. pp. 57-72), and had he intended to kill himself, he would have removed his hat, which would have been a protection against any blow on the head; to permit it to remain on his head would possibly have defeated an attempt at suicide. The evidence does not indicate that Moon was standing on the edge of the pool prior to his fall, as was contended for by counsel for the Insurance Companies and was apparently followed by the Circuit Court of Appeals in their opinion, because the evidence distinctly shows that Moon stepped on the loose and unstable concrete block which served as steps in the pool, for in no other way can the chip on the edge of the pool and the mark on the wall where the steps struck be

accounted for. (Tr. pp. 59, 60, 74.) No man, attempting to end his life by striking his head at a particular place would select an unsecure step to stand upon from which to jump; particularly so when a secure solid place might just as easily have been found. To select such an unsecure place would be calculated to defeat his purpose. The fact that the wound is upon the back of the head clearly evidences that when he fell and struck the edge of the pool or the pipe in the bottom of the pool, he was face up. It is also clear that had Moon jumped into the pool in this manner he could not see what he was doing and was unable to judge accurately so as to be sure of producing the unconsciousness and drowning which would result in the loss of life. By jumping in the pool face down, all of these considerations would have been fulfilled. The fear of pain, of suffering, of severe injury, motivates all who attempt suicide to select a sure, effective and efficient way in which to put an end to life.

To accept the contention that Moon was a suicide, as adopted by the Circuit Court of Appeals, is to ignore uncontradicted evidence of the concrete step striking the west wall of the pool and leaving its mark and a chip thereon (Tr. p. 59-60); to ignore that Moon's feet were by and against this concrete step (Tr. p. 56); to ignore the protection that the hat would have afforded the back of the head, and to ignore the letter which Moon wrote to the Bank on the Sunday afternoon following the writing of the note of Saturday (Tr. p. 193). The jury pondered these questions and found, by its verdict, that the *physical facts* at the pool *did not* disclose suicide.

The Circuit Court of Appeals, in its opinion, referred at length to the note of Saturday night (Tr. p. 252), but Moon returned to his home after writing that note. The said Court also paid no heed whatever to the hope and expression stated in the letter written to the Bank follow-

ing the writing of the note of Saturday night. (Tr. p. 193.) The note of Saturday night cannot be considered positive proof of suicide; it is but an item in the chain of circumstances. Before there could be suicide, there must be an intent to destroy oneself, and the act or acts carrying out and consummating the intent thus formed. No one saw Moon die; there were no eye witnesses to his passing. The physical facts at the pool must be examined and be given *weight* also as evidence. The Court, under the law, has not been given the scales with which to weigh the evidence.

If we apply the rule of universal application which is fairly drawn from the decisions above quoted—that if all fair-minded men would not agree that under the evidence offered the death of the insured was the result of suicide, rather than accident, the question is one for the decision of a jury—to this case we find twelve men on the jury, and the District Judge, who, by the verdict and judgment, have confirmed the fact that Moon's death occurred from accident and the fact that the Circuit Court of Appeals, in its opinion, believes to the contrary, as announced in its opinion, but establishes the fact that the evidence is such that all fair-minded men would not agree thereon.

We assert that it was the right and prerogative of the jury to weigh in the scales of Justice these items of evidence, and, hence, under the Constitution and under the rules established by innumerable decisions, the petitioner is entitled, we submit, to have the question decided by the jury, and is entitled to have the Jury's verdict, that Moon died by accident, preserved to her as guaranteed under the Constitution.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory power in order that the errors here pointed out may be corrected; that the judgment of the Circuit Court of Appeals may be reversed and the judgment of the District Court reinstated and affirmed in order that justice may be done this petitioner, and to that end a writ of certiorari be granted, and this Court should review the decision of the United States Court of Appeals for the Fourth Circuit and reverse the same.

Respectfully submitted,

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